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No. 99-380

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, et al.,
Petitioner,

v.

HERBERT MARTELL COLLINS AND
UWANDOLYN BLACKWELL COLLINS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of the Amici States in Support of Virginia

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INTERESTS OF THE AMICI CURIAE

The 34 Amici States have a significant interest in the interpretation of the Eleventh Amendment and its application to bankruptcy proceedings. As a practical matter, the States are creditors in hundred of thousands of bankruptcy cases each year with respect to debtor obligations such as taxes, fines, student loans and domestic support obligations. The Amici States therefore are seriously and adversely affected by lower courts' efforts to end run the States' Eleventh Amendment immunity in bankruptcy cases.

The Fourth Circuit's decision in this case gives debtors complete control to force litigation of contested discharge issues involving the States into possibly distant bankruptcy courts, even in no-asset cases where the States have not filed a claim. Moreover, The Fourth Circuit's decision ignores this Court's prior decisions regarding the Eleventh Amendment in cases based on *in rem* jurisdiction. In so doing, the Fourth Circuit's approach in this case could eliminate the States' Eleventh Amendment immunity in any case involving property under a federal court's jurisdiction. That unwarranted result could extend far beyond the bankruptcy context because there are many instances in which a federal court's jurisdiction is based, at least in part, on the court's control over a particular *res*.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION WILL HAVE A TREMENDOUS IMPACT ON THE STATES IN BANKRUPTCY CASES

This Court's recent state immunity cases emphasize that the Eleventh Amendment represents an essential constitutional principle that the lower federal courts must respect and enforce. Some lower courts, however, including many bankruptcy courts, have actively sought opportunities and methods to circumvent or otherwise obviate the States' constitutional immunity. *In re Collins*, Pet. App. 1-20a, is a notable example.

1. The importance to the States of bankruptcy courts properly respecting the States' sovereign immunity is demon-

strated by the sheer volume of bankruptcy proceedings and the States' roles in them. In the year ending June 30, 1999, according to statistics kept by the Administrative Office of the United States Courts, almost 1.4 million bankruptcy cases were filed. Of that total, 97 percent (or 1,352,030 petitions) were filed by individuals, to whom the discharge and the exceptions to discharge provisions of Section 523 of Title 11 of the United States Code apply. Of that 1.35 million cases, Chapter 7 liquidation cases comprised 71.65 percent, and of that number, some 95% were so-called "no-asset cases," *i.e.*, there were no non-exempt assets in the estate available for distribution to creditors.[1] In such "no asset cases," creditors are routinely informed by the bankruptcy court *not* to file any claims. In the vast majority of such cases, there are no proceedings that would require direct involvement of creditors before the trustee prepares his report to the court. Once the trustee files the report, if no timely objections to the discharge are filed, the "court shall forthwith grant the discharge."[2]

Thus, in the last fiscal year, there were some 920,000 bankruptcy cases in which the States could potentially have been creditors holding debts that would be excepted from discharge, but in which the States would *not* have filed claims,

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[1] The statistics on case filings are taken from the website of the Administrative Office of the United States Courts, http://www.uscourts.gov/news.html, and are contained in a press release entitled "In June, Total Bankruptcies Filed Decline Again, Personal Bankruptcies Fall for First Time in 5 Years" and dated August 6, 1999. The statistics on "no-asset" filings are contained in the *Report of the National Bankruptcy Review Commission, Vol. 1*, p. 137, based on a study by the General Accounting Office of case filings in 1992. As the Review Commission noted, that 5% figure also includes asset filings by non-individuals, in whose cases some 80% of the total bankruptcy receipts were recorded. Thus, the number of cases filed by individuals with significant assets against which claims may be filed is vanishingly small.

[2] *See generally* Federal Rules of Bankruptcy Procedure (hereinafter FRBR) 4004.

and in which the States would not have had any reason to make an appearance or to otherwise be deemed to have voluntarily invoked the jurisdiction of the federal courts. This would normally suggest that the States' Eleventh Amendment immunity would preclude the federal courts from entering any order against them. But *Collins* end runs all of this.

Under *Collins*, the States could face undesired discharge litigation in literally hundreds of thousands of cases. Indeed, the frequency with which States must appear to defend their rights in bankruptcy proceedings is increasing as bankruptcy courts are permitting plans and schedules to include provisions contrary to the Code and binding States to them under *res judicata* theories. *See, e.g. In re Andersen*, 179 F.3d 1253 (10th Cir. 1999) (creditor cannot sit on its rights and expect bankruptcy court or trustee to protect its interests; in absence of timely objection, court enforced plan provision that discharged student loan on the basis of hardship even though there had been no litigation or proof on that issue); *In re Pardee*, 218 B.R. 916, 922 (B.A.P. 9th Cir. 1998), *aff'd in unpublished opinion*, No. 98-15942, 1999 WL 462339 (9th Cir. July 7, 1999) (when chapter 13 plan contains a provision that is contrary to the Code, student loan creditor must object to the plan or appeal confirmation order; failure to do so bars creditor from collaterally attacking the plan after confirmation).

2. Moreover, because of the nationwide jurisdiction of the bankruptcy courts, this undesired litigation may take place in forums in which there is no factual or legal basis for asserting jurisdiction over the State except for the circumstance that the debtor has chosen to move to that locale.[3] Each court is

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[3] FRBP 7004(d) provides for national service of process and allows the debtor to force any litigation into the location of the bankruptcy filing, so long as the creditor has the required "minimum contacts" with the United States, regardless of the lack of contacts with the forum jurisdiction. *E.g. In re Federal Fountain, Inc.*, 165 F.3d 600, 601-602 (8th Cir. 1999); *In re TJN, Inc.*, 207 B.R. 502, 506 (Bankr. D. S.C. 1996); *In re Allegheny Inc.*, 68 B.R. 183, 187 (Bankr. W.D. Pa. 1986).

allowed to determine its own rules for permitting out-of-state counsel to appear and for requiring local counsel as well. There are close to a hundred separate bankruptcy districts—and an equal number of sets of local rules and requirements. Unlike the Rules applicable to Multidistrict Litigation which automatically allow all parties to retain their existing counsel and appear in the case without further effort,[4] it is often necessary for a State to prepare motions for admission, pay a fee, and retain additional counsel, all before the State can even defend itself in a proceeding that the State has no desire to have heard in federal court to begin with. As a result, when a particular debt is relatively small, the costs to the States of pursuing such issues in a distant bankruptcy forum will often be impractical. Thus, debtors may—by the simple expedient of instituting the litigation in a distant forum—be able to obtain a discharge for which the Code does not provide.

Examining several specific examples puts the problem in full perspective. The vast majority of taxes, for instance, are nondischargeable. Since virtually all debtors are taxpayers, there is a potential for tax discharge issues in almost every proceeding. By the same token, many debtors have student loans outstanding when they file bankruptcy, obligations that are nondischargeable unless and until the debtor obtains a determination that repaying the debt would be an undue hardship. *See* Higher Education Amendments of 1998, Pub.L. No. 105-244, § 971, 112 Stat. 1581, 1837 (1998); S.Rep. No. 95-989, at 79 (1978); *e.g., In re Johnson*, 218 B.R. 449 (B.A.P. 8th Cir. 1998); *In re Stout*, 231 B.R. 313, 315-316

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[4] Rule 1.4 of the Federal Rules for Multidistrict Litigation provides: "Every member in good standing of the Bar of any district court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. Any attorney of record . . . may continue to represent his or her client in any district court of the United States to which such action is transferred. Parties to any action transferred under Section 1407 are not required to obtain local counsel in the district to which such action is transferred."

(Bankr. W.D. Mo. 1999), *Buford v. Higher Education Assistance Foundation*, 85 B.R. 579, 582 (D. Kan. 1988). States are involved in collecting those loans in a great many cases and face the potential for being forced into a bankruptcy court wherever the debtor chooses to live after graduation.

As a third example, numerous debtors owe nondischargeable domestic support obligations to their children and former spouses. The States are often deeply involved in collecting those debts, either for the spouse and children, or for the States' own accounts, when the States have already provided financial support to those beneficiaries. Again, the noncustodial spouse has often moved far from the locale where his or her children and former spouse reside, perhaps specifically to avoid payment of those obligations.

In each of these situations, there is no reason either logically or under the law that a discharge determination must be made in federal court. *See* 28 U.S.C. § 1334(b) (granting federal courts original, but not exclusive, jurisdiction over matters "arising under title 11, or arising in or related to cases under title 11", which includes discharge determinations). Section 523(a) of the Bankruptcy Code (11 U.S.C. § 523(a)) defines eighteen grounds for excepting debts from discharge—but only four of those *must* be litigated in bankruptcy court.[5] All other exceptions are self-executing, and state and federal courts have concurrent jurisdiction to apply those exceptions. Moreover, the fact that certain debts owed to the States are not dischargeable demonstrates the significance Congress attached to those debts being collected. Collection will often be difficult or effectively impossible when the debtor alone controls the choice of forum for resolving disputes.

3. The impact of the *Collins* decision is all the more serious because Eleventh Amendment immunity is not just an immunity from substantive liability, but rather an immunity from being

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[5] Sections 523(a)(2), (4), (6), and (15). *See* Section 523(c)(1).

haled into federal court at all. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf and Eddy Inc.*, 506 U.S. 139 (1993). Put another way, although federal bankruptcy *law* is supreme, the federal *courts* do not necessarily possess the authority to enforce that law against an unconsenting State. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *In re NVR, LP*, No. 98-2211, 1999 WL 486614, at *9 (4th Cir. July 12, 1999).

The effect of the Fourth Circuit's decision would be to allow debtors, by the simple expedient of including a request to determine the dischargeability of a debt in a motion to reopen a no-asset Chapter 7 case (or some other motion the debtor may choose to file), to force the States to contest such matters in a bankruptcy court at a time and in a location of the debtor's choosing. This effectively nullifies the provisions in the Code and in 28 U.S.C. § 1334 that such matters can be adjudicated in state courts where the States typically would bring collection actions.[6]

Moreover, many of the issues in such discharge disputes are governed more by state law than by any federal bankruptcy provisions, thus providing even less justification for removing these matters from their natural fora, the state courts. The dischargeability of taxes, for instance, depends largely on the filing date of the taxes and the timeliness of the debtor's returns—both of which are matters that state tax law governs. To the extent there are particular questions and disputes over those issues, the state courts are, with all due respect to the bankruptcy courts, the *better* qualified forum for adjudicating such issues. Similarly, the dischargeability of a domestic support obligation turns upon the nature of the award a *state* court made in the first place and the intricacies of federal domestic support collection law, the latter topic being one with

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[6] There is nothing unusual about adjudicating discharge issues in state court. Indeed, until 1978, there were no requirements that *any* discharge exceptions be adjudicated in the bankruptcy courts. *See Brown v. Felsen*, 442 U.S. 127 (1979).

which state domestic support enforcement agencies in fact have great familiarity, unlike the bankruptcy courts.

In sum, the Amici States will be seriously and detrimentally affected if the lower courts give debtors complete freedom to force litigation of virtually any discharge issue into bankruptcy court, often in distant jurisdictions, and even in no-asset cases where the State has not filed a claim and has not reason to make an appearance.

II. THE FOURTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S DECISIONS

Virginia's Petition for a Writ of Certiorari addresses many of the ways in which the *Collins* decision conflicts with this Court's decisions. The Amici States agree with Virginia's arguments, and will address two of the most far-reaching flaws in the Fourth Circuit's reasoning: (1) that court's elevation of form over substance and (2) its incorrect reliance on the purported *in rem* nature of bankruptcy proceedings.[7]

A. *In re Collins* Improperly Relies On Magic Words And Captions To Dictate The Effect Of A Pleading.

When a State is called upon to protect its interests, and is informed that if it fails to do so the relief requested will be granted, a suit has been instituted against the State, regardless of whether the filing is called a petition, complaint or motion. To hold otherwise—as the Fourth Circuit did—elevates form over substance. Moreover, contrary to *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *Alden v. Maine*, 119 S. Ct. 2240 (1999), the Fourth Circuit's reliance on the word "suit" ignores the fact that the Eleventh Amendment does not create rights, but rather simply confirms the rights that States had at the Founding. This Court repeatedly has emphasized the

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[7] The Amici States also agree with Virginia's arguments with respect to the substantive discharge issue but do not address that question in light of their view that the Eleventh Amendment should have precluded the lower courts from reaching that issue at all.

impropriety of relying on isolated words or technicalities of form when dealing with the constitutional immunities of the States. *See, e.g., Alden v. Maine*, 119 S. Ct. at 2254 ("To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*."); *Seminole Tribe*, 517 U.S. at 68.

By allowing the mere form of a pleading to dictate the State's immunity, without regard to the substance of the remedy the debtor seeks, the Fourth Circuit's reasoning permits a debtor to litigate any issue involving a State so long as it files its request in the form of a "motion," rather than a traditional complaint. This elevates form over substance, in violation of this Court's oft-expressed view that the scope of the States' immunity turns on the real values at stake, rather than on the "elementary mechanics of captions or pleading." *Idaho v. Couer d'Alene Tribe*, 521 U.S. 261, 270 (1997).

The Fourth Circuit acknowledged that the bankruptcy court's ruling on the debtor's "motion" would affect Virginia's legal interests: "We recognize that this put the Commonwealth in a tough spot. It could decline to appear and thereby forego the opportunity to make its argument and challenge any decision. On the other hand, it could voluntarily submit to federal jurisdiction and take part in the proceedings." Pet. App. 14a. That alone should have resolved the matter in the State's favor, for that "tough spot" is precisely what the Constitution prohibits.

The Fourth Circuit nevertheless held that "[f]orcing the Commonwealth to make such a choice 'does not amount to the exercise of federal judicial power to hale a State into federal court against its will and in violation of the Eleventh Amendment.'" *Id.* at 14a (citation omitted). The court reasoned that "[t]he Commonwealth . . . was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court. The Commonwealth was free

to respond to the motion or ignore it." *Id.* at 11a. Accordingly, the court concluded, the Collins' motion was not a "suit" for Eleventh Amendment purposes. *Id.*

With all due respect, that reasoning is unpersuasive. The Commonwealth was not "free to respond to the motion or ignore it." The motion put Virginia in a "tough spot" precisely because the State's legal rights would be altered if the State chose not to appear, just as would be the case if the State did not answer a complaint.[8] Put another way, when a federal court enters an order—at the instance of a private individual—that purports to have a binding effect on a State that has not even appeared, much less consented to that court's jurisdiction, that court has violated the Eleventh Amendment, no matter the nature of the proceeding in which the order was issued.[9]

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[8] Both a bankruptcy motion and a complaint identify the court and describe the parties affected and the relief sought, both must be served on affected parties to be effective, and both provide that the failure to respond in a timely fashion will result in a default judgment. Compare FRCP 4 (the summons shall "require the defendant to appear and defend, and shall notify the defendant that *in case of the defendant's failure to do so judgment by default will be rendered against the defendant*" (emphasis added)) with FRBP 9013 (motions shall state with particularity the grounds therefor, shall set forth the relief or order sought, and be served by the moving party on those entities specified by the rules) and FRBP 9014 (in contested matters in which relief is requested by motion, reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought, and motion shall be served in the manner provided for service of a summons and complaint). *See also In re O'Brien Environmental Energy, Inc.*, No. 98-6331 1999 WL 707781, at *6 (3rd Cir. September 13, 1999) (Bankruptcy Rules "generally require a motion when notice *to an opposing party* is necessary, and only allow an application if no such notice is required" (emphasis added)). *And see Black's Law Dictionary* 1434 (6th ed. 1990) (defining "suit" as a "generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law . . . .").

[9] *Cf. United States v. Murdock Machine and Engineering Co. of Utah*, 81 F.3d 922, 931 (10th Cir. 1996) ("In determining whether the United States

Legal formalities are especially untrustworthy in a court of equity, such as a bankruptcy court. Bankruptcy is meant to be a simple and expedient remedy for good faith debtors seeking a fresh start. It would be contrary to that end, therefore, to require that the caption of the petition be amended and the document served and re-served on each creditor, every time a new creditor or claim is added. Instead, the petition merely lists the name of the debtor at the top and schedules the creditors in a separate list that provides the basis for service of notice of the various proceedings in the case. Proper listing and service of creditors plays a critical role in bankruptcy court because, if a creditor is not listed or served with notice, the discharge or other action is generally ineffective against that creditor. *See, e.g.*, Section 523(a)(3); *In re Unioil*, 948 F.2d 678, 683-684 (10th Cir. 1991); *United States v. Cardinal Mine Supply Co.*, 916 F.2d 1087, 1089-1092 (6th Cir. 1990); and *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 833-835 (11th Cir. 1989).

At bottom, there is no practical distinction between a motion that seeks to affect the rights and interests of the parties in a bankruptcy and a complaint that does the same in a typical civil case. The existence of a "suit" is a question of function and effect, not artful captioning. Thus, whether labeled a "suit" or a "motion," when a debtor's action seeks to alter a State's legal rights, a proceeding within the meaning of the Eleventh Amendment has been instituted against the State.

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is immune from 'suit,' courts interpret the term 'suit' broadly to include more than just an actual suit instituted against the United States. . . . Thus, the term 'suit' embodies the broad principle that the government is not subject to 'legal proceedings, at law or in equity' or 'judicial process' without its consent. . . . Interpreting the term 'suit' broadly comports with the core notion of sovereign immunity that in the absence of governmental consent, the courts *lack jurisdiction* to 'restrain the government from acting, or to compel it to act.' *Larson*, 337 U.S. at 704, 69 S.Ct. at 1468.")

B. The Fourth Circuit's Decision Rests On An Improper Understanding Of Federal Courts' *In Rem* Jurisdiction

The Fourth Circuit made two fundamental errors concerning the interaction of bankruptcy law, *in rem* proceedings and the Eleventh Amendment. First, the court erred in holding that bankruptcy proceedings are simply *in rem* actions. Second, the court erred in holding that the Eleventh Amendment does not apply to in rem actions. Both of these errors will create significant problems for the States if the Fourth Circuit's holdings are not reversed.

1. The Fourth Circuit held that the bankruptcy court's jurisdiction stems from the court's jurisdiction over the debtor's assets and person. Pet. App. 11a. But a bankruptcy discharge injunction necessarily requires more than jurisdiction over the debtor and his estate. A discharge order enjoins the world at large from seeking to enforce claims against the debtor's assets, except in compliance with the bankruptcy court's order. The discharge of debts—which bars future actions by creditors—is the unique essence of a bankruptcy case. Whether or not a creditor files a claim, whether or not that claim is satisfied, indeed, whether or not there is *any* property in the estate at all, the debtor may still receive a discharge that enjoins all further litigation over debts previously incurred. *See In re Newport Offshore Ltd.* 219 B.R. 341 (Bankr. D.R.I. 1998). This right to impose a discharge obligation that precludes future litigation by creditors must stem from some power other than *in rem* jurisdiction over the debtor's assets.

Although a bankruptcy proceeding serves to divide the assets of the debtor's estate, it does much more than that. A true *in rem* action, such as an interpleader proceeding, does nothing more than to divide up an existing asset. Even in a *quasi in rem* action, where a court exercises jurisdiction over an asset in order to compel a defendant to appear in a locale that could not otherwise exercise power over him, the court's

jurisdiction extends no further than to the parties' rights in the asset at issue. By definition, an action that is based merely on control over a *res* can only determine rights to that particular *res* between various claimants. It does not serve to foreclose future litigation between those persons if the asset at issue was insufficient to satisfy all pending claims. By contrast, bankruptcy courts do exactly that—imposing an injunction on all attempts to collect existing debts from future assets—which is why their orders cannot be based solely on *in rem* jurisdiction.

2. In any event, this Court repeatedly has held that the Eleventh Amendment applies to *in rem* proceedings. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) ("we have never applied an in rem exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists, see *United States v. Shaw*, 309 U.S. 495, 502-503 (1940)"); *Cory v. White*, 457 U.S. 85 (1982) (Eleventh Amendment bars federal court from determining a State's rights in Howard Hughes' estate—the classic *res—in a federal interpleader action filed by the estate's administrator); Missouri v. Fiske*, 290 U.S. 18 (1933) (proceeding to restrain State from adjudicating interests in the decedent's estate was a "suit" within the meaning of Eleventh Amendment even though it sought only injunctive relief).

The Court has applied similar reasoning to *in rem* suits involving the United States. In *United States v. Shaw*, for example, the United States filed a claim in a state probate court and the state court determined that the estate possessed a counterclaim against the United States that exceeded in amount the claim of the United States. The argument was made that the court's order was not really a judgment, but "only a judicial ascertainment" of "credits with respect to the *res* of the debtor's estate." This Court nonetheless held that the United States' immunity from judgments in state courts protected it from having an affirmative judgment entered against it *even though* it had voluntarily appeared and filed a claim in the case.

At most, the lower court could find that the countervailing claim was sufficient to defeat the government's claim. 309 U.S. 504. The fact that the state court's action was based on its *in rem* jurisdiction over the decedent's estate was not deemed sufficient to allow the court to enter orders unrelated to the *res* against the United States.[10]

The Fourth Circuit's opinion ignores these precedents and could be applied in many other areas of the law outside of bankruptcy. Indeed, the Fourth Circuit's approach could virtually nullify the Eleventh Amendment in any case in which a federal court has jurisdiction over property. If a federal court's control over an asset is sufficient to trump the States' Eleventh Amendment immunity, the States can expect to see numerous situations characterized as *in rem* exceptions to the States' immunity by ingenious plaintiffs and sympathetic courts.

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[10] Similarly, in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), the lower court entered judgment on a counterclaim against the United States in a reorganization proceeding, based on the court's jurisdiction over the *res* of the company at issue. This Court held that the decision was void, and could be collaterally attacked in a subsequent proceeding, because the federal government had not consented to entry of the order.

Conclusion

The Amici States request that Virginia's Petition for a Writ of Certiorari be granted.

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